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No. 98-316

In the Supreme Court of the United States

OCTOBER TERM, 1998

OFFICE OF THE PRESIDENT, PETITIONER,

v.

OFFICE OF INDEPENDENT COUNSEL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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In rewriting the "Question Presented," the Office of Independent Counsel ("OIC") seeks to have the Court treat this case as nothing more than a minor dispute over the Federal Rules of Evidence, and to ignore one crucial fact: an inferior officer of the Executive Branch has been empowered, at his unilateral whim and immune from judicial review, to require the Deputy Counsel to the President to reveal, in the face of the very real threat of impeachment, his advice to the President about his official duties.

That threat, having become dramatically more ominous in the weeks since the court of appeals' decision, was—unbeknownst to the court of appeals and the White House—in fact all too real on June 29, 1998, at the very moment when the Independent Counsel was arguing that it was "too remote a possibility to be considered by the Court." Stephen Labaton, *Lewinsky Case and 'Privilege' Fought in Court*, N.Y. TIMES, June 30, 1998, at A1.[1] On July 2, only *three days* after making that representation to the court of appeals, the OIC moved the Special Division for leave to include in a referral to the Congress matters protected by Fed. R. Crim. P. 6(e). See *In re Madison Guaranty Sav. & Loan Ass'n*, Div. No. 94-1 (D.C. Cir. Spec. Div. July 7, 1998) (granting "'Ex Parte Motion for Approval of Disclosure of Matters Occurring Before a Grand Jury' filed by Independent Counsel Kenneth W. Starr on July 2, 1998"), *reprinted in* OFFICE OF INDEPENDENT COUNSEL, REFERRAL TO THE UNITED STATES HOUSE OF REPRESENTATIVES PURSUANT TO TITLE 28, UNITED STATES CODE, § 595(c), app., vol. 2, tab B (Sept. 9, 1998) ("Referral").[2]

To our knowledge, the OIC never sought to correct the record in the court of appeals. Nor, in its brief in this Court, has the OIC explained why it made such a representation or, for that matter,

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[1] We cite to the newspaper account of the oral argument because no transcript is available. The argument was open to the public and press.

[2] In August 1998, after the court of appeals' decision and after the OIC secretly declared in its July 2, 1998 filing its intention to submit a report to Congress, the OIC recalled Mr. Lindsey and two other members of the Office of Counsel to the President to the grand jury. (See Opp. at 5 n.1; H.R. Doc. No. 105-310, at 206–209 (Sept. 11, 1998)). The OIC did not inform the White House, nor to our knowledge the district court, that it intended to use the testimony in its then-planned report to Congress rather than in furtherance of its grand jury investigation.

even addressed in any meaningful fashion the constitutional implications of its role in the impeachment process.

The White House has been all too aware of those implications since the expansion of the OIC's jurisdiction in January 1998, and has argued from the beginning that the OIC was conducting the grand jury investigation as a stalking horse for the Legislative Branch. The effect of the judgment below will be to allow Congress to pierce the Executive Branch's consultations with its counsel merely by delegating to an inferior executive officer the power to compel their disclosure. That holding is an affront to the separation of powers. Review by this Court is manifestly warranted to restore the constitutional balance.

ARGUMENT

The OIC simply fails to address the important constitutional problems the decision of the court of appeals creates. Most remarkably, contrary to the arguments of both the White House and the United States as *Amicus Curiae* in the court of appeals, the decision below allows an Independent Counsel to do what no other executive branch officer, not even the Attorney General, may do: *require* a *superior officer* in the constitutional hierarchy to divulge his communications with counsel.

This is far too sweeping a power to vest in an "inferior officer" of government. See *Morrison* v. *Olson*, 487 U.S. 654 (1988) (resolving constitutional challenge to powers of Independent Counsel by holding that the Independent Counsel is an inferior officer of the government). When coupled with the statutory subsection providing for a report to Congress, the OIC's essentially unreviewable power to compel disclosure of attorney-client confidences from *higher* officers within the constitutional hierarchy necessarily raises the question whether the OIC has slipped the bounds that ordinarily limit the powers of inferior officers. See *Edmond* v. *United States*, 117 S. Ct. 1573, 1580–1581 (1997) ("'inferior officers' are *officers whose work is directed and supervised* at some level by others who were appointed by presidential nomination with the advice and consent of the Senate"); accord Brief *Amicus Curiae* For the United States, Acting Through the Attorney General, at 14, *In re Lindsey*, 148 F.3d 1100 (D.C. Cir. 1998) ("Amicus Br.") ("the independent counsel . . . has no institutional competence or authority to balance the prosecutorial need for the information against the potential threat to the ability of the President or other high level official effectively to obtain legal advice").[3]

The OIC also fails to address the practical consequences of the decision below. As it stands, the President may not confer regarding official government business with his Counsel with any confidence that their communication will not be disclosed. The President and his Counsel cannot predict in advance whether a future prosecutor may regard their communication, however innocent, as "contain[ing] information of possible criminal offenses" (Pet. App. 2a) and therefore unprivileged. (See Pet. App. 26a). The law has long recognized, however, that this advance assurance of confidentiality is necessary if the privilege is to serve its important public ends. See *Upjohn Co.* v. *United States*, 449 U.S. 383, 393 (1981). By denying the *ex ante* assurance of confidentiality that is essential to foster candor, the decision below places the President at a unique disadvantage and devalues the privilege across the board. The OIC responds by urging the President to retain private counsel, but does not explain how it can be in the public interest for government officials to retain private counsel to advise them on official matters.

The OIC also argues that review is not required here because the court of appeals reached essentially the same conclusion as the Eighth Circuit did last year. That is not so. The Eighth Circuit ruled that communications between the First Lady and lawyers in the Office of the Counsel to the President are not privileged in the face of a federal grand jury subpoena. See *In re Grand Jury Sub-*

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[3] The distance this Independent Counsel has traveled from being an "inferior officer" of the Executive Branch within the meaning of *Edmond* is breathtaking. The Independent Counsel has, in this matter, disagreed with the Department of Justice's view that communications between the President and his Counsel are privileged; opposed the Department of Justice, the Treasury Department, and the professional judgment of the Secret Service that interference in the relations between Presidents and the Secret Service could imperil Presidential security; and has written a brief to the House of Representatives arguing that the President as head of the Executive Branch should be removed from office.

poena Duces Tecum, 112 F.3d 910 (8th Cir.), cert. denied, 117 S. Ct. 2482 (1997). The OIC scarcely acknowledges two critical distinctions between the cases: the privileged communications sought here belong to the President of the United States, as head of the Executive Branch of government; and the communications were being sought so that the OIC, an inferior officer of the Executive Branch, could include them in a recommendation to Congress that it impeach the President. While the White House believes that the Eighth Circuit case was wrongly decided, this case presents a substantially different issue.

Other arguments the OIC makes in its Opposition merit brief response:

1. As the Petition demonstrated, the divided panels of the two courts of appeals have applied widely divergent standards to the question presented here. In attempting to paper over the division between the decision below and the ruling of the Eighth Circuit, the OIC argues that the D.C. Circuit simply adopted the Eighth Circuit's analysis and ruled that "a governmental attorney-client privilege does not apply at all in federal criminal proceedings." (Opp. 18 n.7). But that is not what the court below did. Instead, although neither side contended for such a result, it expressly adopted a novel *content-based* test to determine whether the attorney-client privilege protected the communications at issue here. (Pet. App. 2a ("[t]he extent to which the communications . . . are privileged . . . depends, therefore, on *whether the communications contain information of possible criminal offenses*") (emphasis added); see generally Pet. 4 & n.4, 16–18.

The OIC takes issue with this interpretation of the court of appeals' opinion, contending that the privilege is never available in the grand jury context without reference to the content of the conversation. But however one reads the court of appeals' holding, the practical and constitutional effects are the same. Putting aside the question whether there is any justification for creating a content-based, after-the-fact test to determine whether a conversation is privileged, the court of appeals has, in effect, vested in the Independent Counsel sole and unreviewable authority to determine whether any given conversation meets that test. The same result follows under the OIC's theory, for it claims the right, merely by

issuing a grand jury subpoena, to override any privilege that the President may choose to assert. Thus, we return to what is the fatal flaw in the ruling below—that it permits an inferior officer unilaterally to require the disclosure of the President's privileged communications.

2. According to the OIC, the attorney-client privilege asserted here lacks historical foundation. (Opp. 14). This is mere *ipse dixit* on the OIC's part, for its brief ignores *all* of the over forty cases (to say nothing of the statutes and codes of evidence) cited in the Petition—authorities that clearly establish that a governmental client, like any other client, has a legally protected right to confer with counsel in confidence. (Pet. 12–14 & nn.6–8). The OIC's only apparent answer to the unbroken line of authority contradicting the decision of the court below is to explain that those cases did not involve "federal criminal or grand jury proceedings." (Opp. 14). But where the common-law attorney-client privilege is at issue, that is a distinction without a difference. The attorney-client privilege has never been thought to apply differently in civil and criminal cases. *Swidler & Berlin* v. *United States*, 118 S. Ct. 2081, 2087 (1998).[4]

Recognizing the lack of precedential support for the decision of the court of appeals, the OIC next attempts to justify it by reference to "[t]he practice of Executive Branch agencies[.]" (Opp. 14). But the evidence of historical practice on which the OIC selectively relies (Opp. 14–15) proves only that previous administrations have not invoked the attorney-client privilege every time they might have. Indeed, that practice also characterizes the conduct of the White House in this matter. Where disclosures would not jeopardize the President's ability to receive the candid legal

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[4] The OIC also argued in *Swidler & Berlin* that the scarcity of cases specifically applying the attorney-client privilege in criminal cases after the death of the client showed that the privilege was historically unrooted in such cases. Besides rejecting the OIC's proffered civil/criminal distinction, this Court also specifically disputed that the scarcity of cases expressly addressing the question cast doubt on the privilege's historical pedigree, stating instead that the "relatively few court decisions [that] discuss the impact of the privilege's application after death . . . . may reflect the general assumption that the privilege survives[.]" *Swidler & Berlin*, 118 S. Ct. at 2087 n.4.

advice to which he is entitled, the White House has allowed the OIC substantial access to White House records and files, including the production of hundreds of documents responsive to subpoenas directed to the Counsel's office. Apparently, the OIC believes that acts of cooperation and good faith forever estop a party from later asserting applicable evidentiary privileges.

What is more, the historical record belies the OIC's facile assertion that past administrations have not asserted an attorney-client privilege in independent counsel investigations. They have. During the Bush administration, the Counsel to the President and a Deputy White House Counsel both invoked the White House's attorney-client privilege in response to Independent Counsel subpoenas for documents and testimony relevant to the Iran/Contra affair. See 1 FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS 478–479 & nn.52, 65 (1993). The circumstances of those cases rendered judicial resolution of the disputes unnecessary, but they leave no doubt that the White House as an institution has long regarded its confidential communications with counsel as being no different, for purposes of the attorney-client privilege, from any other client's communications with counsel.

3. The OIC contends that this Court's decision in *United States* v. *Nixon*, 418 U.S. 683 (1974), overcomes the White House's attorney-client privilege. Of course, *Nixon* involved the executive, not attorney-client, privilege, and is not directly on point here. Nevertheless, the OIC contends that, because the qualified executive privilege is grounded in the Constitution and the absolute attorney-client privilege is grounded in the common law, the attorney-client privilege is less "'fundamental to the operation of Government'" (Opp. 16) and may not, therefore, be invoked in grand jury proceedings.

The OIC's opposition (Opp. 13–14) parrots the very quotes from *Nixon* and from *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), that this Court found to be irrelevant when the attorney-client privilege is at issue. See *Swidler & Berlin*, 118 S. Ct. at 2087–2088 ("both *Nixon* and *Branzburg* dealt with the creation of privileges not recognized by the common law, whereas here we deal with one of the oldest recognized privileges in the law"). Rather than come to grips with this language, the OIC's brief

come to grips with this language, the OIC's brief merely repeats its rejected arguments as if *Swidler & Berlin* had never been decided.

The flaw in the OIC's reliance on the *Nixon* decision is the unsupported assumption that the existence of a testimonial privilege depends on the "importance" of the communications sought to be protected. Neither the OIC, nor either of the courts of appeals to have considered the argument, attempted to show that the privilege protects communications the court deems "important" or "fundamental" to any lesser, or greater, degree than communications not so labeled.

Moreover, we know of no authority, and the OIC cites none, to suggest that the source of law a court consults has any bearing on the validity of the attorney-client privilege. The OIC assumes that constitutionally based privileges are superior to common-law privileges, but this distinction has never been recognized in the law. Indeed, this Court has consistently rejected such a hierarchy of privileges, instead stating that a grand jury "may not itself violate a valid privilege, *whether established by the Constitution, statutes, or the common law.*" *United States* v. *Calandra*, 414 U.S. 338, 346 (1974) (emphasis added). *Nixon* certainly did not hold that an absolute privilege, such as the attorney-client privilege, must give way in circumstances where a qualified privilege could be pierced.

4. The OIC relies on 28 U.S.C. § 535(b) in an effort to find a statutory abrogation of the attorney-client privilege where none exists. That provision, by its terms, does not apply to the White House. It applies to any "department or agency" of the federal government, but the White House is neither. See *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156 (1980); *Haddon* v. *Walters*, 43 F.3d 1488, 1490 (D.C. Cir. 1995). The purpose of the statute was to resolve an interagency turf battle, and Congress did not intend to abrogate any privilege. See H.R. Rep. No. 83-2622, reprinted in 1954 U.S.C.C.A.N. 3551, 3551.[5]

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[5] In the argument on the protective function privilege before the D.C. Circuit, the court pointed out to the OIC that under his argument, a confession made by a

5. Nor does the doctrine of *Garner* v. *Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970)—which has never been adopted by this Court—support the panel majority's result.[6]

Garner rests on principles not implicated here. Most fundamentally, the court adverted repeatedly to the fact that the party claiming the privilege owed a fiduciary duty to the party seeking to discover the communications. In the "particularized context" of a shareholder derivative action, the court found it all but dispositive that "management has duties which run to the benefit ultimately of the stockholders." *Garner*, 430 F.2d at 1101. At its core, therefore, *Garner* stands for the unremarkable proposition that the client's owners are entitled to have the client account for its use of their capital, including to retain counsel.

This reasoning has no application to this case. It cannot plausibly be contended that the OIC is the true holder of the privilege at issue here. The Independent Counsel—an inferior officer to the President—is in no sense the "client" whose communications with counsel are sought to be disclosed. Nor can the court of appeals' reliance on *Garner* be saved by assuming, contrary to our electoral system, that the OIC speaks for the interests of the public as a whole. The interests of the White House as an institution are distinct, and the institution is entitled to defend them against encroachment by other Branches of government or by inferior officers within the Executive Branch. See *Nixon*, 418 U.S. at 692–697

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member of the military to the Military chaplain would not be privileged. The OIC acknowledged that he did not read the statute to abrogate the priest/penitent privilege. Yet there is certainly no room in the text of the statute to conclude that Congress intended to abrogate certain common law privileges and not others. The court of appeals understood this, and limited its reliance on the legislation to only its policy implications.

[6] The court of appeals in *Garner* rejected the conclusion of the district court that the attorney-client privilege was "totally unavailable against the stockholders." *Garner*, 430 F.2d at 1097. Forswearing a total abrogation of the privilege, the court of appeals held instead that the shareholder plaintiffs must "show cause why it [the privilege] should not be invoked in the particular instance." *Id.* at 1104 (emphasis added). The court of appeals here went substantially beyond *Garner* in holding that, if the OIC believes (even wrongly) that a communication "contain[s] information of possible criminal offenses" (Pet. App. 2a), the OIC may discover it without any showing of cause.

(dispute between White House and special prosecutor is justiciable).[7]

6. The OIC's revisionist interpretation of *Swidler & Berlin* v. *United States*, 118 S. Ct. 2081 (1998), collapses under scrutiny. Far from supporting the holding of the court below, that decision leads inexorably to the opposite result. *Swidler & Berlin* involved, as this case does, an attempt by the OIC to narrow the scope of the common-law attorney-client privilege. The OIC argued, and the panel majority of the court of appeals held, that the common-law attorney-client privilege had a narrower scope in criminal cases than in civil cases. This Court rejected that view in language requiring no further elaboration. See *id.* at 2087 ("there is no case authority for the proposition that the privilege applies differently in criminal and civil cases, and only one commentator ventures such a suggestion[.]").

None of the OIC's counter-examples can deflect the force of this Court's reaffirmation that the common-law attorney-client privilege, as it had long been understood, has the same scope in civil and criminal cases. Fed. R. Evid. 501 adv. comm. note ("privileges shall continue to be developed . . . under a *uniform standard applicable both in civil and criminal cases*") (emphasis added).

Thus, it is irrelevant that Congress may choose to enact a *statutory* privilege applicable only in civil cases. (Opp. 25 n.14). Nor is *Swidler & Berlin*'s rejection of the OIC's civil/criminal distinction for the common-law attorney-client privilege of any consequence for the myriad other privileges discussed in the OIC's brief. (Opp. 24–26). The attorney-client privilege occupies "a unique place in our jurisprudence," *People* v. *Knuckles*, 650 N.E.2d 974, 979 (Ill. 1995), and exists to "encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co.* v. *United States*, 449

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[7] See also Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893 (1991) (cataloging numerous instances where divergent interests of federal agencies yield justiciable disputes).

U.S. 383, 389 (1981). All of the examples the OIC cites are *qualified* privileges that always turn on precisely the sort of balancing test this Court has long rejected for the absolute attorney-client privilege. See *Swidler & Berlin*, 118 S. Ct. at 2087.

7. Finally, although the OIC clings to the fiction that the Attorney General supports its position (Opp. 10, 15), she does not. In an *amicus* brief strongly supporting the White House's attorney-client privilege, the Department of Justice warned that the OIC's position "would impair the ability of the President . . . to obtain frank, fully informed, and confidential legal advice" and that "[s]uch a result is not necessary for effective federal criminal investigations." Amicus Br. 4. The Department of Justice recognized that no case law supported the "categorical exception to the privilege in criminal proceedings" sought by the OIC. *Id.* at 9. Finally, the Attorney General well appreciated that, because of the "unique, and uniquely consequential, powers and responsibilities" vested in him by the Constitution, "the Nation's interest" requires that "the President must have access to legal advice that is frank, fully informed, and confidential." *Id.* at 24. Because the decision below upsets the constitutional balance of powers and imposes a unique disability on the one constitutional officer who acts for the Nation as a whole, this Court must intervene.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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